TO: **Lignite Energy Council**

FROM: **Paul M. Seby**

DATE: **September 3, 2008**

RE: **AN ANALYSIS OF THE FEDERAL LAND MANAGERS' AIR QUALITY RELATED VALUES WORKGROUP (FLAG) PHASE I REPORT (*REVISED*) AND ITS IMPACT ON THE DEVELOPMENT OF A NATIONAL ENERGY POLICY**

I. INTRODUCTION.

As state and federal policy makers continue efforts to work towards a comprehensive energy policy capable of meeting present and future energy needs, the U.S. Departments of Interior and Agriculture have issued a revised "guidance" document that continues the policies that have made it difficult to permit new energy generation sources and manufacturing facilities. The Federal Land Managers' Air Quality Related Values Workgroup Phase I Report (Revised) ("FLAG 2008") seeks to update the original FLAG guidance document adopted in 2001 ("FLAG"). As with the original FLAG, FLAG 2008 is a significant federal administrative process that must be reviewed in the context of any comprehensive energy policy.

As requested by the Lignite Energy Council ("LEC"), we have conducted a detailed review of the FLAG 2008 Report. FLAG 2008 continues to raise several complex technical and regulatory issues. From the perspective of LEC's members' interests, the FLAG 2008 process will have a direct and immediate affect on existing coal and natural gas-fueled electrical generating facilities as well as any future new or modified facilities.

The FLAG process was adopted by the National Park Service, U.S. Forest Service and U.S. Fish and Wildlife Service (the "Agencies") in January 2001 and, according to FLAG documents, became "effective" on April 1, 2001. On June 27, 2008, FLAG 2008 was released by the Agencies. FLAG 2008 states that the FLAG process empowers the Federal Land Managers ("FLMs") with "consistent policies and processes both for identifying air quality related values ("AQRV") and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I air quality areas, but in some instances, in Class II areas (all other federal, state and tribal lands)." *FLAG 2008* at vi. AQRVs, as defined in the Clean Air Act, are visibility, soil, flora, fauna, and water quality.

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The FLAG 2008 criteria are applied to determine the "acceptability" of a proposed new project to be sited within Federal Class I areas. Additionally, the FLMs apply FLAG 2008 as part of all National Environmental Policy Act ("NEPA") review and planning efforts.

Substantial concerns remain regarding the proposals and effect of FLAG 2008. Specifically, FLAG:

- **FLAG deploys a loose and unpredictable regulatory process.** FLAG significantly expands the authority of the FLMs over non-federal land use and development—similar to the ill-fated/unlawful "integral vistas" proposal of the early 1980's. "The information and procedures outlined in this document are generally applicable to evaluating the effect of new or modified sources on the AQRVs in both Class I and Class II areas, including the evaluation of effects as part of the review of Environmental Impact Statements under the National Environmental Policy Act (NEPA)." *FLAG 2008* at vii n.2. As such, the impact of the FLMs' elevation of their role substantially beyond the boundaries of a particular Class I or Class II area places them in a position to significantly influence state and local energy and land use policy and decision-making.

- **FLAG is not a guidance document**. Instead, it has been developed by the FLMs to substantively function as a definitive set of regulatory requirements. FLAG is therefore the type of government action (a substantive legal rule in the guise of a "guidance document") that the D.C. Circuit Court of Appeals, the court with principal national responsibility for judicial oversight of federal agencies like EPA and the FLMs, has repeatedly overturned because of due process circumvention. Some of the prescriptive FLAG requirements (from which related technical and scientific questions and concerns also arise) are that FLAG:

    - Establishes threshold "acceptability" values and metrics for determining "adverse impacts" attributed to ozone exposure.

    - Establishes a defined threshold for requiring an applicant to conduct a regional or multi-source cumulative air quality impact study before determining the "acceptability" of that individual source. "The permit applicant must perform an air quality impact analysis for each pollutant subject to PSD review (40 CFR §51.166)." *FLAG 2008* at 14.

- Unilaterally assumes "background" visibility conditions for each Class I area.

- **The FLAG guidance exempts AQRV-impacting actions by FLMs.** By carving out the massive air quality consequences (and AQRV impacts) from their own land management practices (like prescribed and wild fire), FLAG unduly burdens new energy project development by imposing requirements to protect the FLMs' narrowly-defined best visibility days. The manner in how these days are defined has the effect of avoiding any responsibility from the FLMs. Such an approach is not consistent with the FLMs' statutory "affirmative responsibility" to protect AQRVs.

II. FLAG 2008.

FLAG 2008 seeks to incorporate changes that reflect the experience and knowledge purportedly gained by the FLMs since its adoption and to also incorporate aspects of the Best Available Retrofit Technology ("BART") guidance subsequently issued by the EPA.

The more significant changes contained within FLAG 2008 include:

A. Proposed sources that have relatively low emissions and are farther from Class I areas are exempt from AQRV review.

B. A new IMPROVE algorithm is used for purposes of the visibility assessment.

C. Incorporating criteria from the 2005 BART guidelines:

1. FLAG 2008 proposes the adoption of a CALPOST Method 6 criteria, which would replace the CALPOST Method 2; and

2. FLAG will use "the 98th percentile value as a threshold in the first-level visibility analyses for new source impacts." *FLAG 2008* at 34.

D. Using the EPA's Regional Haze Rule's estimates of "natural visibility conditions" as reference levels for Class I visibility analysis. *FLAG 2008 at 29.*

E. Deposition analysis and concern thresholds for nitrogen and sulfur depositions are proposed.

III. DETAILED DISCUSSION.

In the federal Clean Air Act Amendments at 1977 ("CAA"), Congress imposed an "affirmative responsibility" on the FLMs to protect AQRVs – those attributes in a mandatory federal Class I area that could be affected by a degradation of the ambient air quality. See, CAA § 165 (d). The framework for exercising this "affirmative responsibility" was adopted as CAA §165(d)(2)(c) and EPA's subsequent implementing

regulations at 40 CFR 52.66(p)(3) and (4). Notably, this deliberate statutory framework has been consistently recognized and enforced by EPA administrative law judges. See, for example, In Re: Hadson Power, 4 E.A.D. 258 (E.A.B 1992) (if Class I increment is exceeded, the applicant bears the burden to demonstrate no adverse impact, but if no increment is exceeded, the FLM bears the burden to demonstrate there is an adverse impact, and a "rational basis" test is used to review a State's determination that the FLM has not met its burden in the second instance), See also In Re: Old Dominion Electric, 3 E.A.D. 779 (E.A.B. 1992) (State must give reasonable consideration to FLMs' adverse impact assertions, but the permitting authority has final determination, and the permitting authority's discretion takes precedence if it was not exercised in an arbitrary or capricious manner).

Despite this detailed statutory scheme, FLAG established a different process with requirements that obviate the role of the existing (or future) Class I increment standards. In doing so, FLAG imposed the burden of demonstrating no adverse impacts of AQRV's on the permit applicant – even if there was no exceedance of the applicable increment. FLAG 2008 proposes a new Initial Screening Criteria that would exempt a source from AQRV review if its annual emissions and distance from a Class I area are such that it is not considered to cause or contribute to a visibility impairment. "[T]he Agencies will consider a source locating greater than 50 km from a Class I area to have neglible impacts with respect to Class I AQRVs if its total SO2, NOx, PM10, and H2SO4 annual emissions (in tons per year, based on 24-hour maximum allowable emission), divided by the distance … from the Class I area … is 10 or less." *FLAG 2008* at 26-27. FLAG and FLAG 2008 also require, under certain defined circumstances, that an individual source conduct a cumulative modeling assessment. However, CAA § 165(d) expressly sets out that the AQRV determination is for an individual source's impacts on any AQRV or increment – not a group of sources in a region beyond the realm of an individual project.

Further, given the prescriptive nature of the FLAG 2008 process and how it is being implemented, FLAG 2008 is not simply the FLMs' efforts to generally inform states and permit applicants of a tentative position the FLMs intend to take in future proceedings. Instead, FLAG 2008 establishes legal standards that affect future permit applicants rights and responsibilities through the FLMs' articulation of what is required to satisfy their view of required elements of NEPA planning or a new or modified source permit – i.e., the legal norm necessary to avoid an adverse FLM recommendation and/or suggested veto of a proposed permit.[1] Further, FLAG 2008 works as a component part of an integrated regulatory process that includes EPA's existing Regional Haze Rule and New Source Review Reform rule. The FLMs' position is therefore "definitive" because the three agencies' planned reliance on FLAG 2008 will have a direct and immediate effect on state permitting authorities and permit applicants. Such a situation is therefore different than agency positions that are merely "tentative." See, Her Majesty the Queen ex rel. Ontario v. EPA, 912 F.2d 1525, 1531 (D.C. Cir. 1990). Rather, the FLAG 2008

[1] See, e.g., "Only the threat of remand of a permit or revocation of [permitting] authority will get the attention of some state and local programs." Memorandum from Don Sheperd (NPS) to John Bunyak (NSP), Dennis Crumpler (EPA), and Lew Nagler, dated December 4,1998. (Emphasis added)

process is more similar to those administrative circumstances where an agency views its "deliberative process as sufficiently final to demand compliance with its announced position." See, Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986).

A. FLAG Cannot Be Used To Regulate Class II Areas.

FLAG 2008 purports to provide an expansion of an FLM role to include Class II areas does not find support in the Clean Air Act. The CAA visibility program protects mandatory Class I areas, which are the federal Class I areas specified in CAA §162(a). Soon after the adoption of the 1977 CAA Amendments, the Secretary of the Interior identified, in consultation with other FLMs, those mandatory Class I areas where visibility is an important value. See, 43 Fed. Reg. 7721 (1978). EPA reviewed that list and concluded that visibility is an important value for 156 of the eligible 158 mandatory Class I areas. See, 44 Fed. Reg. 69,122 (1979). Two wildernesses, Rainbow Lake (Wisconsin) and Bradwell Bay (Florida), were excluded. The list of the 156 mandatory Class I areas is codified at 40 C.F.R. Part 81, Subpart D. Each mandatory Class I area is the responsibility of the FLM with authority over such lands (e.g., the Secretary of Agriculture for U.S. Forest Service lands and the Secretary of the Interior for National Park Service and U.S. Fish and Wildlife Service lands). See, CAA § 302(i).

Congress made it clear that both EPA and the FLMs are prohibited from requiring "the use of any automatic or uniform buffer zone or zones" around mandatory federal Class I areas. See, CAA §169A(e). Further, specific congressional action is required before non-federal property can be regulated in accordance with the Property Clause of the federal Constitution (Article IV, § 3, Clause 2). While it has not done so, Congress may always specifically designate newly created parks and wilderness areas or other federal lands as mandatory Class I federal areas.

If Congress had not otherwise specifically limited the scope of the federal CAA visibility program to “federal” and “mandatory” Class I areas, then the term could be interpreted to encompass any state, tribal, and federal lands initially designated as Class II areas under CAA §162(a) but subsequently redesignated as Class I under CAA § 164.

The FLAG 2008 process purports to find FLM authority to regulate Class II areas under other federal statutes. As set forth below, that is not correct.

i. U.S. Department of the Interior: National Park Service (NPS) and Fish and Wildlife Service (FWS):

The National Park Service Organic Act, 16 U.S.C. §1, et seq., mandates national unit managers to “conserve the scenery and the natural historic objects and wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. See, 16 U.S.C. §1. The statute gives the Secretary of the Interior authority to promulgate regulations for the “use and management” of lands under Park Service control. See, 16 U.S.C. §3. Other provisions of the statute give the Secretary specific rulemaking authority over such use-specific activities as “boating and other activities s on or relating

to waters located within areas of the National Park System." See, 16 U.S.C. §1(a)-2(h). There is nothing in the statute, however, that expressly or impliedly grants regulatory authority for defining "air quality related values" or quantifying impacts thereto.

ii. U.S. Department of Agriculture: U.S. Forest Service (Forest Service)

Similarly, the Forest Service's Organic Administration Act of 1897 directs the Secretary of Agriculture to: "[M]ake provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . ." See, 16 Sec. §551 (1997). As noted by the FLAG policy directive:

The National Forest units are managed consistent with Land and Resource Management Plans (LRMPs) under the provisions of the National Forest Management Act (NFMA). 16 U.S.C. §1604 (1997). Any measures addressing AQRVs on National Forest System lands will be implemented through, and be consistent with, the provisions of an applicable LRMP or its revision (16 U.S.C. §1604(i)). (Emphasis added.)

In addition, the Secretary of Agriculture is required to prepare and transmit to the President, a Renewable Resource Program every 5 years. This Program must include program recommendations which recognize the fundamental need to protect, and where appropriate, improve the quality of . . . air resources. See, 16 U.S.C. §1602(5)(c). The Forest Service's implementing regulations for NFMA are found at 36 C.F.R. §219 et seq. (Emphasis added.)

While the Secretary of Agriculture has certain rulemaking authority over forest and rangeland resources (See, e.g.,16 U.S.C. §1613), there is no express grant that would allow for air quality rules to be promulgated by FLMs in contradiction with EPA's express authority over this area. Instead, the USFS recognizes the regulatory means by which it will implement and apply AQRV-related measures – via its specific LRMPs.

The FLMs also together recognize their lack of express rulemaking authority in the FLAG policy directive, stating, "most Federal Land Manager (FLM) enabling legislation and regulations developed to implement Federal Laws do not directly address air quality, or air pollution effects on Parks or Wildernesses. They do, however, provide broad direction on what should be protected in Parks and Wildernesses (the earth and its community of life) and to what degree (preserve natural conditions or conserve resources unimpaired)."

B. The FLAG 2008 Exemption For Federal Land Management Activity Impacts Places a Grossly Disproportionate Burden on Western States.

Notwithstanding FLAG 2008, the FLM's previously themselves, the Grand Canyon Visibility Transport Commission ("GCVTC") and the Western Regional Air Partnership have all concluded that emissions from fires from federal lands are not only a major contributor to regional visibility impairment in the west, but often will overwhelm visual air quality gains from other sources and must be addressed. Noticeably absent from the source category to be held responsible for future visibility improvement are

other members of the federal establishment which are primary sources of "the problem" the FLMs are ordering certain entities and states to fix. Any FLM proposal, to be defensible, also must mandate federal agency emitters lead the way in reducing visibility-impairing emissions from their respective land management activities.

While fire events may indeed be episodic, ozone emissions from such fires have been shown to exceed the thresholds defined by the FLAG 2008 Report as establishing vegetation damage as a AQRV "injury". Notably, an example of the significant impacts associated with FLM use of fire as a land management tool comes from the 1988 Yellowstone National Park fires:

> It is interesting to note that 17 of the 20 hours [above 80 ppb] occurred during 1988 at Yellowstone National Park, WY, this site experienced a massive fire during that year. We believe that most of the 17 hours of exceedances greater than 80 ppb may be associated with the forest fire. A number of investigators have observed the production of O_3 from forest fires. Westberg, et al. have observed O_3 concentrations in plumes up to 40 ppb above background levels.

See, "Background Ozone in the Planetary Boundary Layer Over the United States" pp 139-40, Altshuller and Lefohn, Air and Waste Management Association, Vol. 46 1996. (emphasis added).

The time has come for FLMs to include in any federal effort concerning further AQRV protection all possible root causes of their potential degradation. Congress agrees. CAA §118 makes it abundantly clear federal facilities and emissions therefrom are subject to regulation under the CAA. Similarly, Federal Courts have confirmed Congressional intent under CAA §118. See, U.S. v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990) and U.S. v. Tennessee Air Pollution Control Board, 967 F. Supp. 975 (D. Tenn. 1997).

By ignoring the impact of western fires, the FLAG 2008 process places an arbitrary and unfair burden on states and businesses in the western United States. This all occurs at a time of increased demand for electrical generation. The federal government must accept responsibility for the significant amounts of regional visibility impairing emissions emanating from federal property. Given available legal authority, why do not the FLMs insist on accountability of future emissions impacts from federal agencies?

C. The FLAG 2008 Process is a Legislative Rule and is Therefore Subject to Requirements for Rulemaking Under the Federal Administrative Procedure Act.

An agency policy, unlike a rule, "does not seek to impose, elaborate or interpret a legal norm" nor bind the agency to a "particular legal policy position." See, Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). United States Tel. Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994). An agency policy merely informs the public of its current enforcement or adjudicatory approach. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94. (D.C. Cir. 1997). However, when agencies apply guidance in a direct and substantive fashion, federal courts have uniformly required the federal agency to comply with the notice and comment requirements of §553 of the federal Administrative Procedure Act (APA). See, Paralyzed Veterans of America v. D. C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) (quoting Shalala v. Guernsey Memorial Hosp. 514 U.S. 987, 100 (1995). See also, Alaska Prof'l Hunters Ass'n v. FAA 177 F.3d 1030, 1034 (D.C. Cir. 1999); Caruso v. Blockbuster-Sony Music Entertainment Center, 174 F.3d 166, 1876-178 (3d Cir. 1999).

In addition to creating a framework process for FLMs to define "AQRV impairment" from existing sources and for new or modified source permit applications and NEPA planning, a detailed review of the FLAG Report reveals the following specific prescriptive regulatory elements:

1. Visibility

a) Establishes visibility modeling requirements.

b) Estimates "natural visibility conditions" in western Class I areas. *FLAG 2008* at 29.

c) Excludes emissions from natural and prescribed fires from "natural" visibility conditions. *FLAG 2008* at 25.

2. Ozone

a) Establishes threshold values and metrics for determining adverse impacts attributed to ozone exposure.

b) Defines visible symptoms on vegetation (below natural background exposure levels) as "damage". *FLAG 2008* at 75.

c) Requires the permitting authority to conduct regional modeling to identify sources believed to be contributing significantly to ozone associated impacts as a basis to make SIP revisions. *FLAG 2008* at 21.

d) Establishes experimental ozone fumigation exposure protocols for defining "damage". *FLAG 2008* at 81.

e) Establishes ozone modeling requirements.

3. Deposition

a) Establishes an approach for determining baseline deposition levels for Class I areas for both wet and dry deposition. Further, FLAG establishes a default method to estimate dry deposition as a fixed fraction of total deposition.

b) Establishes deposition modeling requirements.

Given the prescriptive nature of the above noted FLAG 2008 elements, FLAG 2008 is not simply the FLMs efforts to generally inform states and permit applicants of a tentative position the FLMs intend to take in future proceedings. Instead, FLAG 2008 establishes legal standards affecting permit applicants' rights and responsibilities through FLMs articulation of what is required to satisfy their view of required elements of a new or modified source permit - - i.e., the legal norm necessary to avoid an adverse FLM recommendation and/or suggested veto of a proposed permit.[2] Further, FLAG 2008 has been implemented as part of an integrated regulatory strategy with EPA's Regional Haze Rule and New Source Review Reform process. The FLMs position is therefore "definitive" because the three agencies' planned reliance on the FLAG 2008 has a direct and immediate effect on state permitting authorities and sources. Such a situation is therefore different than agency positions that are merely "tentative". See, Her Majesty the Queen ex rel. Ontario v. EPA, 912 F.2d 1525, 1531 (D.C. Cir. 1990). Rather, FLAG 2008 is more similar to those administrative circumstances where an agency views its "deliberative process as sufficiently final to demand compliance with its announced position." See, Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986).

Given the FLMs planned reliance on the FLAG process in FLMs' review of new or modified source permitting, and that it can serve as a framework for future certifications of impairment with regard to existing sources, FLAG is an action from at least three federal agencies from which "legal consequences will flow." See, Bennet v. Spear, 520 U.S. 1564, 168 (1997).[3] This fact cannot be avoided by the FLMs "merely by choosing the form of [guidance] to express its definitive position on a general question of interpretation." Her Majesty the Queen, 912 F.2d at 1531 (quoting Ciba-Geigy, 801 F.2d at 438 n.9).

D. FLAG 2008 Should Be Revised to Clearly Recognize That FLMs Lack the Legal Authority to Regulate Land Uses Not on Federal Property.

The CAA does not give FLMs responsibilities or direction for determining management goals for FLM-managed lands that differ from those found in the various federal land management acts. In fact, CAA § 310(a) states the CAA shall not be construed as superseding or limiting the authorities or responsibilities under any other

[2] See, e.g., "Only the threat of remand of a permit or revocation of authority will get the attention of some state and local programs." Memorandum from Don Sheperd (NPS) to John Bunyak (NSP), Dennis Crumpler (EPA), and Lew Nagler, dated December 4, 1998. (emphasis added)

[3] Appendix G, entitled "FLAG Participants" identifies, in addition to the three FLM agencies, representatives of the U.S. EPA and U.S. Department of Commerce.

provisions of law of any other federal officer, department, or agency. In other words, the CAA does not enlarge the FLMs authority, which derives from other federal statutes.

Appendix B of FLAG 2008, entitled "Legal Framework For Managing Air Quality And Air Quality Effects On Federal Lands" is stated to "set out the basic legal authorities and responsibilities with which the FLMs comprising FLAG must comply, in addition to those authorities which they can utilize to protect AQRVs on public lands." *FLAG 2008* at 115. Appendix B then strings together a collection of statutory citations referring generally to the conservation and preservation of national parks and forest lands. However, the FLAG Report Appendix B summaries must be understood in the context of the applicable statutory schemes which detail how certain Federal lands are to be managed.

Because FLAG 2008 involves more than just the management of federal lands, an understanding of federal authority for regulating activity occurring off-federal property is essential. Specific congressional action is required before non-federal property can be regulated in accordance with the Property Clause of the federal Constitution (Article IV, § 3, Clause 2). See, Kleppe v. New Mexico, 426 U.S. 529 (1976); United States v. Alford, 274 U.S. 264 (1927); Camfield v. United States, 167 U.S. 518 (1897); Cappaert v. United States, 426 U.S. 128 (1976); Free Enterprise Canoe Renters Association v. Watt, 711 F.2d 852 (8th Cir. 1980). In each of these cases Congress specifically authorized federal agencies to regulate activities taking place on non-federal lands. None of the cases involved an agency taking regulatory actions in the absence of an act of Congress, let alone contrary to a specific statutory framework adopted by Congress.

Federal control of activity on private property may otherwise only qualify as "needful Rules and Regulations respecting ... property belonging to the United States" when required to protect federal lands, either physically or so that they will remain intact for congressionally established purposes. For example, a statute prohibiting leaving an unextinguished fire "in or near" a public forest was found by the U.S. Supreme Court to clearly be designed to protect the forest from the physical threat of fires. See, United States v. Alford, 274 U.S. 264 (1972). As such, under the Property Clause, the government could constitutionally prosecute someone who left a fire on private property. As the Supreme Court stated in United States v. Alford: "The danger depends on the nearness of the fire, not upon the ownership of the land where it is built. Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests." Id. at 267. Earlier, in Curtin v. Benson, 222 U.S. 78, 85 (1911) the Supreme Court required convincing proof be established by the government that any private use at issue would cause damage to the public land. Extending the holding in Curtin, the Alford decision requires the government to demonstrate "direct physical peril to federal property.

In the absence of specific Congressional action and any indication of direct physical harm occurring at all Class I areas, FLMs cannot develop a prescriptive FLAG process which sweeps so broadly in its application with little scientific support demonstrating the presence or likelihood of direct physical harm occurring to federal lands.

E. FLAG Should be Revised to be Made Consistent With the Statutory Role of the FLM in Evaluating New Source Impacts on Class I Areas.

During reauthorization of the Clean Air Act (CAA) in 1977, considerable time was devoted to the debate regarding efforts needed to strengthen national ambient air quality standards (NAAQS). Congress focused on the concern that an adequate margin of safety was then lacking in the NAAQS. Congress resolved that issue by concluding that adequately protecting the public health would be best served by restricting future growth in pollutant levels to less than the Class II increment. This is the foundation of the CAA's PSD program.

Also in 1977, Congress recognized the need to protect national parks, monuments, and wilderness areas from the harmful effects of air pollution. As such, Congress designated areas of a certain size where air quality is important to the enjoyment of the areas as Class I areas and afforded additional protection under the 1977 amendments to these areas. (See, CAA §§ 165 and 169.) Specifically, in CAA § 165 (d), Congress gave the FLM the "affirmative responsibility" to protect AQRVs — those attributes within federal Class I areas that could be affected by a degradation of the ambient air quality from now or modified sources.

It is critical the FLMs "affirmative responsibility" be understood in the context of applicable Congressional intent:

> "The Class I increment is a test for determining where the burden of proof lies and is an index of changes in air quality. It is not the final determinant for approval or disapproval of the permit application.
>
> The Federal Land Manager . . . is authorized to notify the State that the proposed source poses a potential adverse impact on the quality of the air within the Class I area.
>
> When no such notice is forthcoming from the Federal lands official . . . the applicant would adhere to the regular requirement for Class II areas, with best available control technology.
>
> When notice is filed, the applicant must demonstrate whether or not the Class I increments would be exceeded in the Class I areas. If they are met, the Federal Land Manager nevertheless can demonstrate to the satisfaction of the State that the emissions would still have an unacceptable adverse effect on the air quality-related values of the Class I Federal lands, then the State must refuse to issue the permit.
>
> If, on the other hand, the permit applicant demonstrates, to the satisfaction of the Federal Land Manager, that there

> would be no unacceptable, adverse impact on the air quality-related values of the Class I federal lands, notwithstanding the fact that the Class I increments would be exceeded, the State may issue the permit."

See, Vol. 6 of the Legislative History of the Clean Air Act Amendments of 1977, August 1978, p. 4727.

This framework was adopted in the CAA at Section 165(d)(2)(c) and EPA's subsequent implementing regulations at 40 CFR 52.21 (p)(3) and (4).[4] As such, under CAA §165 the responsibility for performing certain air quality impacts analyses is bifurcated as follows:

1. If a proposed new source meets the applicable Class I increment the burden is on the FLM to demonstrate to the state permitting authority that the proposed new source will adversely impact a Class I area.

2. If a proposed source does not meet the Class I increment, the source must demonstrate to the FLM that there will be no harm to the Class I area.

Notably, this deliberate statutory framework has been consistently recognized and enforced by EPA administrative law judges. See, In Re: Hadson Power, 4 E.A.D. 258 (E.A.B. 1992) and In Re: Old Dominion Electric Cooperative, 3 E.A.D. 779 (E.A.B. 1992).[5]

Contrary to CAA § 165, the FLAG 2008 process attempts to establish new substantive standards that obviate the role of existing Class I standards. In doing so, FLAG seeks to impose the burden of demonstrating no adverse impacts on AQRVs on the source using specific criteria and thresholds, even if there is no exceedance of the applicable increment. If the FLMs are concerned Class I increments for Class I Areas are not adequately protecting AQRVs, the scientific case should be made to EPA to revise those increments to a level as may be necessary since only the Administrator of the U.S. EPA can promulgate regulations under the federal Clear Air Act. In the absence of that lawful approach, FLMs should not unduly assert themselves when no potential increment violation is shown.

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[4] "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." Stark v. Wickard, 321 U.S. 288, 309 (1944). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[5] See, In Re: Hadson Power, 4 E.A.D. 258 (E.A.B 1992) (if Class I increment is exceeded, the applicant bears the burden to demonstrate no adverse impact, but if no increment is exceeded, the FLM bears the burden to demonstrate there is an adverse impact, and a "rational basis" test is used to review a State's determination that the FLM has not met its burden in the second instance), See also In Re: Old Dominion Electric, 3 E.A.D. 779 (E.A.B. 1992) (State must give reasonable consideration to FLM's adverse impact assertions, but the permitting authority has final determination, and the permitting authority's discretion takes precedence if it was not exercised in an arbitrary or capricious manner).

FLAG 2008 also proposes, under certain defined circumstances, to require an individual source to conduct a cumulative modeling assessment. *FLAG 2008* at 14. However, CAA § 165(d) expressly states that the assessment focuses on an individual source's impacts on any AQRV or increment. Further, the suggested expansion of an FLM role to include Class II areas does not find support in the Clean Air Act. The FLAG proposal is therefore not consistent with the CAA's deliberate framework regarding the delegated role of the FLM.

IV. CONCLUSION.

FLAG 2008 should be revised considering the above comments and the following principles:

- The FLMs must not shift the cost of any desired or necessary studies to the states or individual permit applicants under federal law.

- The FLMs must protect AQRVs through a systematic approach for addressing assertions of impairment, including peer reviewed verification of assertions of impairment, before any "pointing of the finger" at a particular source.

- The FLMs must use a process that equally addresses all potential sources of AQRV impairing emissions.

- The FLMs must have the flexibility to accept different control strategies for different sources and unique regulatory processes of each state agency.

- The FLMs must streamline the process to protect AQRVs, while avoiding unnecessary oversight and expense, by working collaboratively with other federal agencies and with state governments.

Sound air quality planning depends on knowing the facts. In many key areas, the FLAG 2008 process lacks supporting or credible scientific data. More facts are needed before the scientific community can determine or attribute the biological effects (harm to plants and animals) of the traces of air pollution that may be found in Class I areas throughout the United States. We must achieve balance in protecting environmental quality and in fostering economic prosperity through affordable, reliable energy.